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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 ERIN DEAN RIEMAN,

11 Petitioner,

12 v.

13 MARGARET GILBERT,

14 Respondent.

CASE NO. 3:16-cv-05250-RBL-JRC

ORDER DENYING MOTION FOR
AFFIDAVITS AND GRANTING
MOTION TO EXPAND RECORD

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16 The District Court has referred this petition for a writ of habeas corpus to United States
17 Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. §
18 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner Erin Dean
19 Rieman filed the petition pursuant to 28 U.S.C. § 2254.

20 Petitioner asks that the Court allow the parties to provide evidence by affidavit rather
21 than live testimony at an upcoming evidentiary hearing, and to expand the record with six
22 additional documents. The purpose of the evidentiary hearing is, in part, to determine the
23 credibility of witnesses. This can best be done through live testimony. Nevertheless, to the
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1 extent that the parties agree that certain witnesses' testimony can be presented through affidavit,
2 the Court will consider those affidavits. Also, because petitioner developed the factual basis for
3 his claims by requesting, and being denied, an evidentiary hearing in state court, and because §
4 2254(e)(2) does not bar him from presenting this additional evidence, petitioner's motion to
5 expand the record is granted.

6 **BACKGROUND**

7 Petitioner originally filed this habeas petition in April of 2016. Dkt. 1. After counsel was
8 appointed and the factual record developed, the Court determined that it could not rule on
9 petitioner's habeas petition based only on the available documentary evidence, and so ordered an
10 evidentiary hearing. Dkt. 50. Respondent filed an objection and appeal to the Court's decision to
11 hold the evidentiary hearing (Dkt. 51), and petitioner filed his motion for affidavits and motion
12 to expand the record thereafter (Dkts. 52, 53). Following a telephone conference, the Court
13 entered a minute order striking the noting dates of the pending motions until the Honorable
14 Ronald B. Leighton ruled on respondent's objections and appeal. Dkt. 63. Judge Leighton has
15 now entered an order denying respondent's objections and appeal. Dkt. 64. The Court entered an
16 order rescheduling the evidentiary hearing to April 5, 2018 (Dkt. 66), and petitioner's motion for
17 affidavits and motion to expand the record are both now ripe for consideration.

18 **DISCUSSION**

19 **I. Motion to Allow Affidavits**

20 ***a. Form of Evidence***

21 Petitioner requests that the Court allow the parties to submit affidavits in lieu of live
22 testimony for several witnesses. Dkt. 52. The Court may receive evidence by oral testimony,
23 deposition, or, on its discretion, affidavit. 28 U.S.C. § 2246. However, when the Court is
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1 required to make credibility determinations, it should not rely solely on documentary testimony
2 and evidence on the record unless the Court is able to “conclusively” decide the credibility
3 question with that evidence. *Earp v. Ornoski*, 431 F.3d 1158, 1169-70 (9th Cir. 2005) (quoting
4 *Watts v. United States*, 841 F.2d 275, 277 (9th Cir. 1988)).

5 Respondent objects to the use of affidavits, arguing, among other things, that doing so
6 would deprive respondent of the ability to effectively cross examine the witnesses in question.
7 Here, the Court ordered an evidentiary hearing in part to better make credibility determinations.
8 Therefore, allowing testimony through affidavits would undercut the Court’s ability to make
9 those credibility determinations. *Earp*, 431 F.3d at 1169-70. Therefore, the Court denies
10 petitioner’s motion to allow testimony by affidavit as to the affidavits of Frank Sullivan and Eric
11 L. Kiesel.

12 However, the Court notes that respondent does not object to witnesses Cynthia Villella,
13 Lee Ann Olson, Debbie Lopez-Stitt, and Patty Carrar providing written, rather than oral,
14 testimony in order to prevent additional trauma. The Court will accept these affidavits and any
15 other affidavits both parties agree are appropriate, giving these affidavits their due weight.

16 ***b. Admissibility of Evidence***

17 Respondent also objects to the affidavits based on relevance. The Court will rule on
18 relevancy objections as part of the evidentiary hearing, but it should be noted that the sole issue
19 before the court is whether or not petitioner’s guilty plea was entered into knowingly,
20 intelligently and voluntarily. The Court is finding it difficult to see the relevance of testimony
21 from witnesses who were allegedly assaulted before petitioner’s guilty plea, and who petitioner
22 was unaware of at the time of entering his guilty plea. Such testimony would not have influenced
23 his decision to plead guilty. Similarly, the murder in Hawaii happened well after petitioner
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1 entered his plea, meaning that it also could not have had an influence on petitioner's guilty plea.
2 Most of the testimony that is the subject of this motion seems to go one issue – to prove that non-
3 party Bremmer has committed violent acts in the past, thus showing he likely committed the
4 murder in this case. That issue is not presently before the Court, but was the subject of this
5 court's previous ruling. See Dkt. 50. This Court previously determined that petitioner had met
6 the burden of proof on the issue of his "actual innocence" and was, therefore, excused from
7 AEDPA's statute of limitations. *Id.* at 5-13. The Court noted at that time:

8 Taking all of the evidence into account, including evidence available at the time of
9 petitioner's conviction and now, and with the benefit of the subsequent
10 investigation and events, the Court finds it more likely than not that if this matter
were to proceed to trial today, no reasonable juror would have found petitioner
guilty beyond a reasonable doubt.

11 Therefore, petitioner is not procedurally barred from bringing the challenge to his
12 *Alford* plea and the Court may move to its merits.

13 *Id.* at 13.

14 The issue of "actual innocence" has been resolved for purposes of ruling on the statute of
15 limitations questions and need not be revisited at the evidentiary hearing. The parties should
16 consider that when deciding what to present at that hearing.

17 **II. Motion to Expand the Record**

18 Petitioner also moves to expand the record, attaching several documents submitted to the
19 superior court, as well as an affidavit affirming the truthfulness of his habeas petition and an
20 affidavit explaining the time stamps on videos submitted by petitioner. Respondent does not
21 object to the superior court documents submitted by petitioner and the Court grants petitioner's
22 motion as to those documents. However, respondent objects to expanding the record to include
23 the additional two documents.
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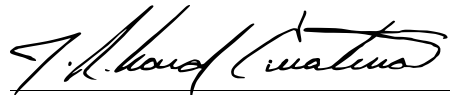
1 For the most part, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) bars
2 petitioner from presenting new evidence if that evidence was not presented to the state court. 28
3 U.S.C. § 2254(e)(2). However, “[a] petitioner who has previously sought and been denied an
4 evidentiary hearing [in state court] has not failed to develop the factual basis of his claim. *Hurles*
5 *v. Ryan*, 752 F.3d 768, 791 (9th Cir. 2014) (citing *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir.
6 2010)); *see also Espinoza v. Spearman*, 661 F. App’x 910, 914 (9th Cir. 2016).

7 Here, 28 U.S.C. § 2254(e)(2) is not applicable. It is true that the Washington state courts
8 denied petitioner’s personal restraint petition based on procedural grounds and that petitioner did
9 not present the evidence on which he now relies to the state courts. *See* Dkt. 13, Ex. 2 at 5; Ex.
10 12; Ex.14. However, petitioner did move the superior court for an evidentiary hearing, which
11 was denied, and subsequently requested that the Court of Appeals remand his case for an
12 evidentiary hearing. *Id.*, Ex. 4 at 2; Ex. 10 at 2, 4; Dkt. 11 at 3. Because petitioner has already
13 asked the state court for an evidentiary hearing, he has properly developed the factual basis for
14 his claim in state court and § 2254(e)(2) does not bar him from presenting additional evidence
15 here. Therefore, petitioner’s motion to expand the record is granted.

16 CONCLUSION

17 For the reasons stated above, petitioner’s motion to allow affidavits at the evidentiary
18 hearing (Dkt. 52) is denied except as to those affidavits both parties agree to admit. In addition,
19 petitioner’s motion to expand the record (Dkt. 53) is granted.

20 Dated this 8th day of March, 2018

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22 J. Richard Creatura
23 United States Magistrate Judge
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